IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

R. E. GLASS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 2485

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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STATEMENT OF THE CASE.

The brief of F. E. Hammond, Esq., counsel for plaintiff in error, filed herein has set out with much detail the history of the cause now brought to the attention of this court. The bill of excep-

tions contains a statement of the case which has met with the approval of counsel representing both the plaintiff and defendant in error. The plaintiff in error and his co-defendant, W. A. Ridgway, prior to the time the Jovita Land Company came into existence, had successfully promoted an enterprise similar to that described herein in the State of Montana. Both of these defendants were interested in this original enterprise and so successful had it been that they were encouraged to set on foot a similar venture within this district. A considerable acreage of land was obtained upon a contract from one C. A. Stokes. This was procured and purchased by the two defendants, paying a small sum down and by a subsequent delivery of the entire consideration or purchase price, which amounted approximately to one hundred and twenty thousand dollars ($120,000). The acreage originally purchased and that which was used in the sale of the Jovita Land Company, herein considered, was something over five hundred (500) acres. The land having been procured, the defendants, through various agents, servants and employees, set about causing the land to be improved in some measure by the clearing of useless timber

and opening of roadways upon the property. The land was surveyed into something over three thousand (3,000) lots, a majority of which were approximately 30x120 feet. Many of the lots, however, were of much wider dimensions, some providing for as much as two to ten acres in area. From the very beginning of the enterprise and throughout its entire history, occupying in the case of the Jovita Land Company, something more than one year, the purpose and plan of the promoters was apparent to the numerous persons solicited to become interested in the proposition. Offices were procured in Seattle and Tacoma and elsewhere. From these offices a perfect stream of literature began to issue and out of these same offices worked a numerous and industrious list of agents. In addition to the use of the mails, these agents were provided with an unlimited quantity of seductive literature, similar in kind to the numerous samples disclosed in the record. Reference to the exhibits will illustrate to the court the alluring and seductive nature of the promises held forth to the various people importuned to become interested in the enterprise. Practically all of the literature sent through the mails and furnished to the agents contains

covert and muddy hints of the great good fortune which somewhere in the future was beckoning to the prospective real estate investor. Due to the energy of the defendants and their various and numerous representatives, something over twenty-seven hundred (2,700) persons were induced to "take a chance" and invest in this mysterious and suggestive scheme. In each case the "chance" was charged for in the sum of one hundred and thirty dollars ($130). In return for this the defendants and their company gave to the prospective purchasers, according to the explanation which they now make, and to each of those purchasers, an undivided one twenty-seven hundredth (1/2700) of the real property of the Jovita Land Company. The explanation of the defendants, as made by counsel to the jury, and by counsel to this court, is that these defendants were foisting upon the courts of this community the burden of untangling the common ownership of twenty-seven hundred owners in one piece of property.

Sales were made to all classes of persons, many of whom for the first time in their lives were to assume the role of real estate investors. These

various persons, or at least many of them, conceded that the only ground for their newly awakened interest in real estate investments was the element of chance involved in securing from this company a tract of land upon which had been constructed by the company and the defendants a more or less substantial dwelling. Not content with the dissimilarity in size and value occasioned by the system of platting adopted, the defendants sought to heighten and increase the disparity between the highest and lowest of the "lucky lot buyers" by the construction upon certain favored tracts of ground of cottages and houses, ranging in value from five hundred dollars to the grand prize known as the Stokes house, which was estimated to have cost the sum of ten thousand dollars ($10,000). Sales were consummated to these numerous purchasers upon terms best calculated to ensnare the poor and the uninformed. Payments in the sum of ten dollars ($10) on each "chance" of one hundred and thirty dollars ($130) were received, and monthly payments thereafter provided for upon such terms as would best suit the prospective buyer. After the sale of the maximum number of "chances" and the receipt of the major portion of the purchase price through

the monthly payments hereinbefore mentioned, notice was given through the channels of the various agencies established and maintained by the company that a meeting would be held upon the land of the company at a certain date specified, at which meeting action would be taken looking to the distribution of the property of the company. Preliminary to this meeting the defendants, Glass and Ridgway, caused to be prepared in the office of the company, deeds descriptive of each of the various tracts, signed, sealed and acknowledged by the defendant Ridway, as president of the company, and executed with the name of the grantee left blank. These deeds were at hand and ready and by the employees of the company delivered on the ground at the platform preliminary to the time of the drawing.

The fact as to the responsibility of the defendants Ridgway and Glass in the conduct of the company is one hardly to be questioned in considering the facts in this case. The land was purchased by the defendants; the corporation was incorporated by the defendants; and those very persons who thereafter became stockholders were the

personal friends and followers and, in many cases, the employees of the defendants. It is admitted in the record, and the fact was well established, that all of the numerous employees of the company took their orders from Ridgway and Glass. Of the two defendants, the plaintiff in error, was generally charged with the responsibility of directing the affairs of the company. In the offices of the company an office was specially set apart for him, in his capacity as an officer of the company, and to his judgment was submitted the decision of every affair of serious concern to the company. Glass lived, during a greater part of the life of the Jovita Land Company, upon the property at Jovita, which is situated approximately twelve miles from Tacoma, and approximately twenty-four miles from the city of Seattle. Glass came to Seattle and to the office of the company almost daily during the time the sales were being made down to the date of the drawing afterwards held upon the property.

Oral representations which supplemented and exaggerated the suggestions in the written literature of the company were generally made through agents employed by the company. It was apparently the theory of the defendants and their operations were

conducted along that line, that they would not and could not be held responsible for the acts and representations of their numerous agents in orally exaggerating the beauties of the method by which the property was to be distributed. Whenever the occasion became urgent, it was the custom of both Glass and Ridgway to explain that the manner of the distribution of the land was a puzzle for the purchasers to decide, but on several occasions Glass supplemented this explanation by a statement to the effect that the usual way was by a drawing or lottery. (See the statement of witness McCash, p. 53, line 5, of the record.)

The method for which provision was made by the company to bring about the distribution of the property was as follows:

The notices hereinbefore referred to having been sent out to the various "lot buyers" of a locality, provision was there made for a local meeting at which a delegate would be selected who was to report at Jovita on the date of the drawing and there act as a direct representative for the purchasers of that particular locality. This arrangement was in a general way carried out prior to the

drawing. As the date of the drawing approached, the defendant Glass, the plaintiff in error, procured the services of a carpenter who was directed by Glass to build upon the ground a raised platform designed and intended for the proceedings afterwards held on the ground. This carpenter was directed as well to build two revolving boxes, and for that purpose Glass furnished the carpenter the necessary plans and specifications. (See page 52, line 15, of the record.) Glass enjoined secrecy upon the carpenter with reference to the construction of these boxes. The office employees of the concern and the field representatives as well were directed to be and appear for duty at the grounds on the date of the drawing. There also mysteriously appeared on the morning of the drawing from some source which was unexplained in the record, numbered cards running from one to twenty-seven hundred, and upon which were inscribed the numbers in that sequence, and upon other cards of a similar number appeared the description of these various pieces of property. The deeds hereinbefore referred to likewise appeared this date on the platform ready for distribution.

The stenographers and office help of the company appeared on this morning and took their places upon the platform, and on this day, following a preliminary ceremony, assisted in the work of filling in and distributing at least a portion of the deeds for the property as the numbers and descriptions were drawn from the two revolving boxes to which reference has already been made.

On the morning of the drawing the defendant Ridgway stepped upon the platform and made a statement to the effect that they were ready to deliver the deeds to the property and asked the persons present to perfect their own organization. A plan seemed to be immediately evolved which was strictly in accordance with the appliances and preparations already made. A committee was appointed and the ballots and boxes were used in accordance with the preparations already referred to. Such part of the work of distributing the deeds, not completed on that date, was afterwards finished by the distribution from the office of the company of those deeds yet remaining on hand.

For the purpose of carrying forward this plan the defendants and the company indulged gener-

ously in the use of the United States mails. So numerous were the different kinds of literature sent out by this company and these defendants, that in the nature of things it was impossible to prove that any specific piece of printing was in fact sent out at the direct instance or request of either defendant. The various employees of the company, when called upon the stand, would identify literature which had been received through the mails by various persons, as being similar to that which had been sent out by them from the office in the general course of the business of the company (p. 52, line 2). There is no question in the record as to the responsible officers under whose direction these employees performed the several duties.

The development of this scheme or plan began in December, 1908, and ran through the year 1909 down to the 4th day of July, 1910, on which date the drawing was held. It will therefore be noted that this scheme or plan was under way during a period of something like a year and a half. Many of the letters and pamphlets referred to were committed to the mail prior to March 4, 1909, and many from time to time thereafter. The defendants were

indicted under ten different counts in cause number 2168. The court will find occasional reference to cause number 2169. This latter case has nothing to do with the case now on appeal. Number 2169 covers the charge brought against the defendants for the distribution, following a similar plan, of the Jovita Heights property.

A demurrer was interposed by both defendants to the indictment and argued before Judge Cushman. This is found on page 20 of the Transcript of Record. It will be noted that the demurrer raised the question of the statute of limitations, and is generally otherwise based upon the statement that the several counts "are not sufficient in law, and that they, the said W. A. Ridgway and R. E. Glass, are not bound by the law of the land to answer the same."

It was conceded by the government that counts I and V were barred by the statute. The opinion of Judge Cushman, as filed, reads "I to V" but this is corrected by the order shown at page 28 of the Transcript of Record.

The defendants were charged in the various counts under section 3894 of the Revised Statutes,

found at page 337 of volume 2, Fed. Stat. Annot., and section 213 of the Penal Code. While there is no reference to the matter in the written demurrer filed in the case, it is apparent from the opinion of the trial court that there was considered the suggestion of counsel, as now made to this appellate court, that there was an improper joinder of the two different offenses in the same indictment. Upon a second trial of the cause (Judge Neterer presiding) a verdict was rendered finding the defendant Glass guilty of counts II, III, IV and VII, and not guilty of counts VI, VIII and IX.

It was the judgment of the court that the defendant Glass should be imprisoned for a period of sixty days on each of the four counts, to be served concurrently, and to be fined the sum of $300 on each of the four counts.

The defendant Ridgway was also fined and imprisoned, but has not appealed from the judgment imposed.

The specifications of error of the plaintiff herein are somewhat numerous, being thirty-four in number, but upon analysis raise few questions for consideration of the court.

Specifications from I to X are considered under one head.

ARGUMENT.

The italics used herein are those of the brief writer except as otherwise noted.

It is first contended by the plaintiff in error that there is an improper joinder in this indictment of offenses charged under 3894 R. S., providing for imprisonment of not more than one year, or a fine of not more than $500, with a charge under section 213 of the Penal Code, which provides for a penalty of imprisonment not in excess of two years or a fine not in excess of $1,000, or both.

Counsel for plaintiff in error have set forth a substantial part of each of the sections referred to, and while the quotation is not entire in either case, it is at least sufficient in each case to show that the subsequent re-enactment was intended by Congress to be a re-enactment of section 3894. The general subject matter is the same; the phraseology is in many particulars the same, and the conduct intended to be proscribed is in all essentials the same. The pleader in the preparation of this indictment

was confronted with this not unusual situation. The law in each section contemplates the existence of a general scheme or plan. Section 3894 uses this language:

> *"concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses."*

Section 213 uses similar language in referring to:

> *"Any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; and no lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes, dependent in whole or in part upon lot or chance."*

Both these sections create offenses which are somewhat, by analogy, comparable to Section 5440, the original conspiracy section of the federal statutes.

It is true that in the conspiracy statute the criminal scheme is itself the crime—in the *postal* statutes referred to, the scheme is an incidental

matter, while the sending of the letter itself is made the offense. A scheme or plan does not in itself contemplate an offense which merges or converges upon a given moment of time. It does contemplate, however, an existing state of affairs which may continue through a more or less indefinite period of time. In the case at bar, the scheme or plan was actually in operation for a period of approximately a year and a half, while during that period of time numerous and continuous violations of law undoubtedly occurred. The Federal Congress had in some measure changed the status of 3894 R. S. by imposing a heavier penalty than before, but Congress did not necessarily intend to repeal the former criminal act, and neither did Congress intend or expect to exonerate any person who had violated its provisions. Since violations had occurred prior to the change in the law, and others had occurred since the change in the law, but since there was but one scheme or plan operating throughout, it was quite natural for the pleader to assume that these various acts of misconduct were so interwoven into each other that they should be joined in one complete indictment. It may well be questioned that, if two indictments had been procured, based

upon these two sections, would any trial court have hesitated, upon motion for the defense, to consolidate the two into one criminal case. On the other hand, what judge, having reasonable consideration for the orderly administration of criminal laws and the expense incident thereto, would have expected or required a prosecuting official to file two separate indictments and try two separate cases involving the use of substantially the same witnesses in each of the two cases.

The attention of the court is called to Section 1024 R. S., a part of the Act of February 25, 1853, found at page 337, Vol. 2, Fed. Stat. Annot. This section reads as follows:

> "When there are several charges against any person for the same act or transaction, *or for two or more acts or transactions connected together,* or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This section may be deemed as supplanting and qualifying any rule of the common law or rules of

practice or procedure which had preceded it relative to the drafting of criminal indictments. It certainly was not intended to have the effect of imposing, either upon a defendant an unreasonable burden, or upon the goevrnment unreasonable restriction and undue expense. There have been many decisions construing this section, but unfortunately nearly all precede the enactment of the new Penal Code, which fixes, for the first time, a satisfactory definition as to the distinction between misdemeanors and felonies. Counsel, at page 41 of his brief, suggests that the government had elected to prosecute the defendant under Section 3894. There was no such election made by the government and no agreement to that effect, so far as it appears in the record, unless the introduction of evidence in support of all the counts constitutes the election referred to by counsel.

Counsel have referred to several early cases, including *United States vs. Gaston*, 28 Fed. 848, and *McElroy vs. United States*, 17 Sup. Ct. Rep. 31, reported also in 41 L. Ed. p. 355.

The latter is a case in which an indictment for assault with intent to kill one Elizabeth Miller; also

an indictment for assault with intent to kill Sherman Miller; both crimes as of date April 16, 1894, were consolidated with a criminal charge of arson of the dwelling of one Eugene Miller, the date being fixed as May 1, 1894, and a fourth indictment against part of the same defendants for the burning of the dwelling house of one Bruce Miller. These incongruous and singular charges were combined by the lower court for trial, and this action was held to be erroneous. The court, through Chief Justice Fuller, suggested that the several charges of the four indictments were not against the same persons; "*nor were they for the same act or transaction, nor for two or more acts or transactions committed together.*" The reasoning of the court further goes to the point that the statute does not authorize consolidation of indictments, "in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." There would seem to be no conflict between a decision of the Supreme Court criticizing a combination of four indictments against different parties for offenses as dissimilar as arson and assault occurring at differ-

ent times, and the action of the court in the case at bar.

Here the sending of the various letters arose out of one and the same plan, scheme and procedure. The letters were sent out to effect a common purpose; the defendants were the same; the moral turpitude of the acts committed prior to the time when the Act of March 4, 1909, went into effect was exactly the same as the moral turpitude involved in the sending of the letters after that time. There was no hardship imposed upon the defendants in the case at bar by reason of the inclusion of other defendants in the case.

The case cited by counsel for the plaintiff in error is not in point so far as it might throw any light upon the case under consideration.

The case of *United States vs. Gaston*, reported in 28 Fed. 848, is a decision by Judge Welker of the United States District Court for the Northern District of Ohio. Judge Welker there refused to permit the joinder of charges for carrying on the business of retailing liquor without posting a stamp in his place, with a charge of not having paid the special stamp, and other charges under Section 3242

R. S., which is a felony punishable by fine and imprisonment. The reasoning of the court is not given, and his decision is in conflict with cases hereinafter referred to.

Reference is made to the case of *United States vs. Howell,* 65 Fed. 402, in which the opinion was written by Judge Morrow. In the opinion of counsel for the government, this case does not sustain the position of plaintiff in error. The court is there called upon to pass upon the complaint of a defendant that the crime with which he was charged, that of having counterfeit money in his possession, was "split up into separate charges as if they were for distinct offenses." The court did not agree with the contention of counsel for the defendant. The court, in construing Section 1024, hereinbefore referred to, discussed the case of *Pointer vs. United States,* 151 U. S. 396, and there calls attention to the fact that the Supreme Court of the United States was, in the Pointer case, giving its authority to the procedure permitting the charging of two separate and distinct murders in the same indictment, for the reason that they were crimes of the same class. The court uses the following language at page 407:

> "But the real test of the whole question, I take it, is whether the defendant is prejudiced in any substantial way. In passing upon this feature of the case, the court is invested with such discretion as enables it to do justice between the government and the accused."

Judge Morrow cites with approval the English case of *Reg. vs. Truman*, 8 Car. & P. 727, a case in which there appeared five counts, each charging the firing of a house of a different owner. The quotation from Erskine, J., is quoted with approval:

> "*As it is all one transaction*, we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defense." (Italics ours.)

The contention of the defendant was not sustained by Judge Morrow in the case referred to.

Counsel for plaintiff in error have quite properly called the attention of the court to the fact that Section 1024, hereinbefore set forth, makes provision for the several sets of circumstances in each

of which it is permissible to join separate offenses in the same indictment. Counsel makes the same classification as that made by District Judge Hawley in the *Jones* case hereinafter referred to, and which is quoted from counsel's brief at page 42 as follows:

> 1st: Where there are several charges against any person for the *same* act or transaction.
>
> 2nd: *Where there are "two or more acts or transactions connected together";*
>
> 3rd: Where there are "two or more acts or transactions of the same *class of crimes* or offenses."
>
> 4th: In each case the acts or transactions must be such as "may be properly joined."

With this distinction before them, counsel cite for consideration of the court, the case of *Pointer vs. United States*, 151 U. S. 396; 38 L. Ed. 208. The *Pointer* case is distinctly and clearly, in our judgment, an illustration of the third contention above enumerated, wherein, two or more acts or transactions of the same class of crimes or offenses may be joined. In the *Pointer* case an indictment was permitted to stand in which the same defendant was charged in separate counts with two distinct

and separate murders committed on the same day. There is no suggestion in the *Pointer* case or any language used which would limit or define the meaning of the conditions 1, 2 and 4, referred to by counsel. It is contended here, not necessarily that these counts in the case at bar referred to the same class of crimes or offenses, so much as it is here contended that these two offenses did constitute—"*two or more acts or transactions connected together.*" It is easy to conceive that in a case such as the Pointer case the witnesses necessary to prove the facts relative to one murder might be entirely different from the set of witnesses required to prove the facts relative to the other murder. This, it is apparent, might work to the serious disadvantage of the defendant. In the case at bar, however, the evidence necessary to prove the sending of each of these letters was, almost in its entirety, the same evidence which would have been necessary to prove the sending of each of the others.

Counsel made reference to the case of *Mackin vs. U. S.*, 29 L. Ed. 909. This case seems to decide a single point, and that is that Section 5440, imposing a fine and imprisonment not in excess of two

years, is a felony. The case has no other application to the case at bar.

Supporting the position of the government, the following cases are called to the attention of the court:

The attention of the court is called to the case of *Norton vs. United States,* 205 Fed. 593-602, where it is contended that the evidence did not support the verdict of conviction on the second count. The court suggested that it is unnecessary for them to review the evidence with respect to this count, as the sentence of the court did not impose any fine, but was one of imprisonment for the same period, to run concurrently, with the sentence on the counts in indictments 587 and 590. Hence, in legal effect, the judgment that was imposed by the court was practically a single judgment and sentence.

In the case at bar, the judgment of the court imposed a sentence of imprisonment for sixty days on each count, the imprisonment to run concurrently.

Rooney vs. United States, 203 Fed. 929.

In construing an indictment charging two de-

fendants in one count as aiding and abetting, and in another count as principals, the court there construes Section 1024 as follows:

> "It would, indeed, be difficult to conceive of two charges more closely connected. * * * Both charges are based on the same transaction and on the same array of facts. Had the motion of the plaintiff in error, to require the government to elect upon which count it relied for conviction, been granted, his position before the jury would have remained unchanged."

The opinion is by Judge Morrow.

Brinie vs. U. S., 200 Fed. 727.

Judge Kohlsatt, in construing a charge with numerous counts, under the oleomargarine Act, said:

> "If this indictment had been against one defendant alone, the various counts charging offenses against different sections of the oleomargarine Act committed at different times and places, each offense to be sustained by its own evidence, might properly have been joined in one indictment by virtue of Section 1024 of the Revised Statutes."

This decision is of especial interest as occurring after the enactment of the section of the Penal Code of 1910 making imprisonment more than one

year a felony and conforms to the ruling of the courts in other oleomargarine cases to which reference is hereinafter made.

Marshall vs. United States, 187 Fed. 511.

In this case the combination of two indictments under Section 5480, mail fraud, was approved by the Circuit Court of Appeals of the Second Circuit.

Emanuel vs. United States, 196 Fed. 317.

The Circuit Court of the same circuit here approves the consolidation of a conspiracy indictment and other indictments under Section 5480, *"under the very broad authority conferred by Section 1024."*

United States vs. Norton, 188 Fed. 258.

The District Judge of the Eastern District of Oklahoma discusses at page 265 the same section and reaches the same conclusion as to the breadth of the purpose and intent of Section 1024.

Hartman vs. United States, 168 Fed. 30.

The Circuit Court of Appeals of the Sixth Circuit, speaking through Judge, now Mr. Justice Lurton, in the *Hartman* case, have passed upon a situation quite similar to that presented here.

The oleomargarine Act of August 2, 1886, makes provision for numerous penalties in its various sections. Section 3, for example, provides for a mere fine; Section 13, for a fine and imprisonment up to one year; while Section 6 provides for a fine and imprisonment not in excess of two years. Each of these various sections provides its own penalty for a certain state of facts. An indictment which included eighteen counts covering all these various sections was upheld. The action of the lower court in refusing to grant a motion to elect was approved. Justice Lurton said:

> *"The offenses were merely statutory misdemeanors of the same class, and the fact that various penalties were attached, by which imprisonment in a penitentiary was possible under some of the counts, did not prevent a joinder of counts under Revised Statutes 1024."* (Italics ours.)

Other cases sustaining the position of the government herein are as follows:

Morris vs. United States, 161 Fed. 672-4.

This is a decision by the Circuit Court of Appeals for the Eighth Circuit, construing Section 1024 in an oleomargarine case, and agrees with the construction in the *Hartman* case.

Krause vs. United States, 147 Fed. 443-444.
United States vs. Jones, 69 Fed. 980.

The plaintiff in error next discusses under the head "Scienter" the use in the indictment of the expression, "a certain circular concerning a scheme dependent upon lot or chance," and suggests that it should read, "prizes dependent upon lot or chance."

The description of the scheme is set forth at length in the indictment (line 23, page 5, Tr. of Record) and all the proper emphasis is laid upon the fact that the prizes were dependent upon lot and chance.

Section 1025 R. S., Vol. 2, Fed. Stat. Annot., p. 340, reads as follows:

> "No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Counsel does not claim that the interests of his client were in any measure prejudiced by the phraseology of that part of the indictment men-

tioned by him; neither does he deny that the scheme was described with sufficient particularity.

It is conceded that in a crime of this kind it is not sufficient to use the mere language of the statute, but the pleader must, with some accuracy describe the particular fraudulent scheme intended to be furthered by the criminal act of depositing the letter. In the case at bar in that part of the indictment to which reference has been made, and which is found on page 5 of the Transcript of Record, the indictment sets forth that land would be acquired and be platted into lots and blocks of dissimilar size and value; that this dissimilarity was to be further increased by the building of houses of different values "upon twelve of said lots," and that thereafter "a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said Ridgway and Glass and their agents and employees."

This certainly describes with enough particularity to properly inform the defendants of the character of lottery scheme charged against them.

Counsel made reference to the case of *United States vs. Cruikshank,* 92 U. S. 524, 23 L. Ed. 588-593. This case is one in which an indictment was brought under a conspiracy section of the Federal Code, which includes as an element of the offense "that the act was done with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him." The Supreme Court held the indictment bad for the reason that the intent of the defendants was a part of the crime charged against the defendants and should therefore have been alleged as a part of the indictment. There is no comparison between the Cruikshank case and the case at bar. There is no phrase or expression of a similar kind used in Section 3894, as in the section under consideration by the Supreme Court. It is not even to be conceded that the criminal knowledge of the existence of the lottery scheme is a condition precedent to the existence of responsibility for the violation of Section 3894, for the reason the statute does not make this knowledge distinctly an element of the statutory crime. If, however, the usual rule of law is applied, that there must be criminal knowledge to create responsibility for violation of a criminal statute, the

indictment complies with that provision by alleging it in the manner provded by the statute.

The case of *United States vs. Kelsey,* 42 Fed. 882-886, referred to, is likewise, in our opinion, not in point. The statute there construed by Judge Maxey of the Western District of Texas includes the word "knowingly" and the pleader failed to include that in the indictment as provided. The court properly held that since the "knowledge" was made a part of the offense by statute, it should be included in the indictment.

The case of *United States vs. Cook,* 17 Wall. 174, 21 L. Ed. 538, referred to by counsel, has no apparent bearing upon the question under discussion. The Supreme Court has there construed a statute providing for embezzlement by a public officer which statute contains within its body an exception. The Supreme Court suggests that the pleading must be sufficiently definite to show that the defendant does not come within the exception noted.

The case of *United States vs. Hess,* 124 U. S. 483, 486; 31 L. Ed. 516, is likewise not in point. The Supreme Court there lays down what is conceded by counsel on both sides to be the law with

reference to charges based upon sections of the criminal code having reference to "schemes" in general—that it is not sufficient to conform merely to the language of the statute in indictments of this kind. In the case at bar, however, the grand jury in its indictment has set out and described with some particularity the scheme which is to be furthered by the letters and pamphlets referred to in the indictment. If the indictment had merely used the words of the statute with no other words of explanation, the case at bar would then fall within the spirit of the decision in the *Hess case*. Reference is again made to that part of the indictment which begins on page 5 of the Transcript of Record.

Counsel complains further that it was nowhere charged that the plaintiff in error knew that the letter deposited was "concerning a scheme," nor that he knew that it was a scheme similar to a lottery or gift enterprise, counsel apparently relying upon the thought that the word "knowingly" as used in the indictment on page 1 of the record, in line 10, modifies and qualifies the words "deposited and caused to be deposited" and has no other relation to the text of the indictment. But that is

not the view taken by courts which have held that the expression when so used will qualify and modify the allegations concerning the circular described in the indictment. Attention is called to the case of

United States vs. Purvis, 195 Fed. 618-619. That case, decided by Judge Newman, is one similar to the case at bar, being a violation of Section 213 of the Federal Penal Code. The court there says:

> "The contention is that the word 'knowingly' as there used only qualifies the verb 'deposit' and not the succeeding language of the indictment setting out the character of the contents of the inclosure. In many cases in which it was charged in the indictment that the defendant 'did knowingly deposit in the post-office' a certain letter, and then proceed to state 'which said letter contained certain unmailable matter,' describing it, it is held that the word 'knowingly' not only qualifies the verb 'deposit' but the whole matter described subsequently in the indictment."

The court cites

13 *Enc. Pl. & Pr.* 395;

United States vs. Clark, 37 Fed. 106;

United States vs. Fulkerson, 74 Fed. 619;

and numerous other cases.

The plaintiff in error complains that the indictment should "specifically state that the defendant knew that the contents of the letter concerned a scheme offering prizes dependent upon lot or chance," but a similar case formerly before this court—

Walkers vs. United States, 152 Fed. 111,

seemed to hold to the contrary.

It is difficult to be patient in discussing specifications of error 11, 12, 23 and 24, referred to in the brief of counsel for the plaintiff in error. The suggestion that these defendants are not to be charged with knowledge of the literature sent out from the office of the company had little weight with the jury, and can be given little consideration after a reading of the bill of exceptions at page 49 of the Transcript of Record. As stated at page 52, "The letters and circulars set forth in the indictment and introduced in evidence were matters which were sent out in the ordinary routine of the office." The literature was ordered and purchased by Lyons, at the instigation and suggestion of the defendant Glass. Both of the defendants in the case were responsible officers to whom all the employees looked

for instruction and advice. The office was stocked with great quantities of this literature which was used from time to time through a period of something over a year.

Counsel complains of the instructions of the court with reference to the relation of the defendants towards the drawing actually conducted on the property, stating that the physical absence of either or both of the defendants was a circumstance which would relieve them from responsibility. The instructions of the court on the subject are found beginning with line 17 on page 69 of the Transcript of Record, and seem to cover the matter referred to.

Counsel complains in specification 33 of the evidence adduced on behalf of the government relative to the value of the property distributed through this scheme or plan. This indictment was brought under a lottery section. Lottery is defined by *Bouvier's Law Dictionary* as—

> "A scheme by which, on one's paying money or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor."

This definition is ascribed to Bishop in his *Statutory Crimes,* Section 952. This definition is in accordance with the generally accepted meaning of the term.

It was the contention in the case at bar, on behalf of the defendants, that they were selling real property. It was the contention on behalf of the government that they were actually indulging in a lottery under the disguise of a real estate scheme. If the defendants were actually selling lots worth in each case $130 or more, it could quite reasonably be argued on behalf of the defense that this was a real estate enterprise and that the purchasers were responding so readily to this alluring literature because they were actuated by impulses of frugality and the desirability for a profitable investment. If, on the other hand, as contended by the government, these lots had no comparative value and were worth not $130, but, in fact, probably $5 or $10 each, it would be some evidence going to show that this seductive literature was appealing not to the frugal sense, but to the gambling instinct which animates in some degree all mankind. It would seem to be the very best evidence of which the subject was

capable in establishing clearly for the jury the very impulse and motive which animated these numerous purchasers. Many of these "lot buyers" testified that they "took a chance" and the fact that ninety-five per cent of the lots distributed had no comparative value, while one tract was valued at $10,000, is strong corroboration of the "chance," small and inconsiderable it is true, which was theirs in this peculiar enterprise.

Counsel complains of a sentence in which the defendant was ordered to be confined at "hard labor" and suggests that the statute does not authorize such punishment, and cites *In re. James S. Wilson*, 114 U. S. 417, 29 L. Ed. 89, and *Mackin vs. U. S.*, 117 U. S. 348, 29 L. Ed. 909, in support of his contention. The facts herein are that the court imposed a sentence of sixty days on each count, confinement in the King County jail, and did not attach to it a condition requiring hard labor. The commitment as entered upon the clerk's records uses the expression "hard labor," as has been the practice for many years in the records of the local court. The cases cited by counsel are not in point and afford no light to the court.

This question was presented to this court in the case of *Mitchell vs. United States*, 196 Fed. 874. The court in its opinion makes reference to the case of *In re. Mills*, 135 U. S. 263, in which case the Supreme Court seems to accept the rule that there is no apparent difference in the effect of the two sentences imposed. The court there said:

> "There are offenses against the United States for which the statute in terms prescribes punishment by imprisonment at hard labor. There are others the punishment of which is imprisonment simply. But in cases of the latter class the sentence of imprisonment—if the imprisonment be for a longer period than one year (Section 5541) may be executed in a state prison or penitentiary, the rules of which prescribe hard labor."

This court there said that the case could not be reversed but that the cause would be remanded with directions to enter the appropriate judgment.

It is not conceded that the mere notation of the clerk becomes the binding judgment of the court. In this particular district and the county to which the defendant Glass was sentenced, hard labor is not in fact imposed upon the prisoners of the county jail. If the defendant has been or will be in future injured by the commitment of the clerk, the com-

mitment can be and will be, by stipulation of counsel, corrected at any time. A new commitment will be issued at any time upon request of counsel for plaintiff in error.

There are no other matters in the brief which in our opinion require discussion.

The defendant was accorded a fair trial and the judgment of the lower court should, in our opinion, be sustained.

Respectfully submitted,

CLAY ALLEN,

United States Attorney.